SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

THOMAS KEE MING HSU, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Thomas Kee Ming Hsu respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion below (Appendix, *infra,* pp. 1a to 9a) has not yet been officially reported, but is attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948).

QUESTIONS PRESENTED

(1) Whether evidence which was admitted at trial and which was prejudicial to the defendant was seized in an illegal search in violation of the defendant's constitutional rights and whether *Chimel* v. *California,* 395 U.S. 752 (1969), is to be given retroactive effect to this petitioner.

(2) Whether a defendant is deprived of due process of law when erroneous and prejudicial information not disclosed to him and contained in a pre-sentence or probation report is relied upon by the judge in imposing sentence.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution

Amendment 4

> "The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

1. Facts as to Question (1)

Petitioner was, on November 22, 1965, indicted on six counts of scheming to defraud in interstate commerce under sections 1343 and 2314 of Title 18 of the United States Code. A preliminary hearing was held with respect to a motion to suppress items obtained as a consequence of a search and seizure which followed the petitioner's arrest. This motion was denied in an unreported opinion by United States District Court Judge Sugarman after a hearing on February 3, 1966. Thereafter, on March 6, 1967, a second indictment of twelve counts was returned superseding the 1965 indictment and alleging additional violations of sections 1343 and 2314 of Title 18. The defendant was convicted on eleven of these counts and sentenced to a total of eight years in the federal penitentiary. By stipulation approved by the trial court, the motion, hearing and opinion of Judge Sugarman denying the motion to suppress were incorporated in the trial proceeding. Appropriate objections were made at trial to the admission in evidence of the items alleged to have been seized in an illegal search in violation of the defendant's constitutional rights.

The facts relating to the search without a warrant are set forth in Judge Sugarman's opinion denying the motion to suppress and in material part are:

> "* * * The agents arrived at defendant's apartment at about 5:00 P.M. on November 22, 1965. Defendant's son answered the doorbell and summoned defendant to the door.
>
> * * *
>
> "As soon as defendant appeared at his apartment door Agent Best advised defendant that the agent was placing defendant under arrest charged with 'violation of interstate transportation of property statute, plus fraud by wire statute'. * * *
>
> "Having been previously advised that the defendant had possession of a revolver for which the agent later found defendant's permit, Agent Best then asked defendant where defendant kept his revolver, to which defendant replied 'I'll show you'. Defendant then led Agents Best and Hansen across a combination foyer-dining room (into which the apartment entrance door from the common hallway opened) through a pair of French doors into a room which served as the bedroom of defendant's daughter Suzanne and also as means of access to defendant's bedroom beyond, and to a bathroom adjoining defendant's bedroom. At the end of the area serving as access to the defendant's bedroom and bath was the last of a string of closets serving defendant's daughter's bedroom and defendant's bedroom, neither of which bedrooms had any other closet facilities. This last closet was immediately opposite the entrance to defendant's bedroom and separated therefrom by a small hallway 3½ feet wide and 5 feet long. When defendant and agents reached the last closet and defendant made a motion toward the inside of the closet, Agent Best stayed defendant and instead reached into the closet himself whence he removed a .38

calibre loaded revolver and a shoulder holster. While Agent Best was obtaining the revolver defendant backed into defendant's bedroom through the door opposite the closet and Agents Best and Hansen followed defendant into the bedroom. After unloading the revolver Agent Best searched defendant's person. Defendant stood near a desk on top of which were 'a lot of business papers . . . and other paraphernalia'. Defendant identified the bedroom, the desk, and the papers thereon as his. After searching defendant's person Agent Best instructed Agent Hansen to search a bureau on the far side of defendant's bedroom while Agent Best searched the top of the desk where he found a photograph of defendant, Generalissimo Chiang Kai-shek and another person 'scrutinizing a line of formation of troops'. * * *

"The agent then returned to the search and proceeded to thoroughly search all drawers and compartments of the desk and obtained from the drawers of the desk three additional photographs of defendant and Chiang Kai-shek, four photographs of defendant with American servicemen, one photograph of defendant leading a horse and one of defendant seated under a Christmas tree with another man. Agent Best also found a hip holster, and a pistol permit which he took from a wallet which he found on top of the desk.

* * *

"Agents Best and Hansen finished their search of defendant's bedroom about an hour and a quarter after they started. * * *"

The photographs which were seized were subjected to expert analysis which indicated that they had been doctored, and testimony to that effect was introduced over objection at the trial. This testimony was significantly prejudicial against the petitioner.

2. Facts as to Question (2)

At the time of sentencing and thereafter with respect to a motion to reduce or suspend sentence the trial judge did not disclose any part of a pre-sentence report which greatly influenced him to the prejudice of the petitioner.* It is believed that that report contains many items of erroneous information, including an allegation that the petitioner had perpetrated the identical swindle just before trial.** This serious accusation is not true.

REASONS FOR GRANTING THE WRIT

I.

With respect to the search and seizure question, certiorari should be granted because the warrantless search and seizure in this case was illegal and a violation of the petitioner's constitutional rights. *Chimel* v. *California,* 395 U.S. 752 (1969). The search and seizure here was not necessitated by any compelling precaution to obtain weapons for the safety of the arresting officers or to prevent the destruction of evidence.

The court below held that the decision in *Chimel* v. *California, supra,* is not to be applied retroactively to this petitioner. See *United States* v. *Bennett,* 415 F.2d 1113 (2d Cir. 1969). This Court reserved that ques-

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* At the time of his arrest the petitioner was released on $4,000 bail. After having been found guilty, his bail was increased to $10,000. Less than three months later—but with a pre-sentence report having been filed—the petitioner was immediately remanded with no bail at all pending appeal.

** This charge was made to the Court of Appeals and, on April 17, 1969, to this Court by the Solicitor General in connection with an application for bail.

tion (*Shipley* v. *California,* 395 U.S. 818 (1969)), and on March 23, 1970 granted certiorari in *Williams* v. *United States,* No. 1125, a case which presents the retroactivity question.

Petitioner respectfully requests, with respect to this question, that certiorari be granted to protect his rights in the event that this Court should hold in *Williams* v. *United States, supra,* that the constitutional standards announced in *Chimel* are to be applied retroactively to petitioners such as this petitioner whose case is on direct appeal to this Court.

The court below, while recognizing that it had already held that *Chimel* was not retroactive (*United States* v. *Bennett, supra*), nevertheless volunteered the observation that, even if *Chimel* were applicable, the search was still proper. This conclusion is hoisted upon an obvious misstatement of fact, and although in context it may constitute dicta, its porosity cannot be ignored. This is particularly true since if this Court should determine that *Chimel* will be given retroactive effect, the application of *Chimel* to the instant case will be the key issue.

In the statement of facts the court below said: "As Agent Best looked down at the top of the desk, he immediately observed what appeared to be a black .25 caliber automatic. This turned out to be 'one of those lighter type things' and not a real pistol, but it might have been seized by Hsu and used to hold the agents at bay and give him a chance to escape." (Appendix, p. 4a) In justifying the search under the *Chimel* test, the court said "it would be unreasonable to restrict the search to the area immediately adjacent to the entrance door in view of the fact that the request for Hsu's

weapon led to the cupboard and to the combined bedroom and office, *where the lighter that resembled an automatic pistol was lying on the desk.*" (Appendix, p. 6a, emphasis supplied)

Clearly the court was justifying the search of the desk because of the weapon-like object appearing thereon, but the facts simply are not as stated. The *only* testimony on this point was by Agent Best at the suppression hearing, and he said:

> "A. When I had this done [searched Mr. Hsu], I noticed that immediately adjacent to Mr. Hsu was his desk and what appeared to have a lot of business papers on top of it and other paraphernalia.
>
> "I asked Mr. Hsu whether or not this was his bedroom and whether or not that desk was his and the papers thereon were his. He indicated and said, 'Yes, they were.'
>
> "I then proceeded to start searching the top of this desk, and about the first thing that I came upon was what appeared to be a small black automatic. However, I determined on closer scrutiny of that item that it was one of these lighter type things and not a weapon." [p. 6]

It is clear, therefore, that Agent Best was in no sense drawn to the desk because of the presence of the lighter or of any fears with respect thereto. Such a factual embellishment, which is critical to the dicta by the court below that *Chimel* would be of no help even if applicable, is unsupported by the record.

The search and seizure in this case did violate the *Chimel* rule, and to the extent that the court below

made an observation to the contrary, it is as inaccurate as the misstatement of fact on which it is based.*

II.

With respect to the second question, certiorari should be granted because:

(1) There is a conflict between Circuit courts with respect to the question of whether the due process clause requires some minimum disclosure of accusatory portions of a pre-sentence report.

In *United States* v. *Fischer,* 381 F.2d 509 (2d Cir. 1967), *cert. denied* 390 U.S. 973 (1968), the Court of Appeals for the Second Circuit held that disclosure of any portion of the probation report was exclusively within the discretion of the trial judge without any qualification for due process protection. In *Baker* v. *United States,* 388 F.2d 931 (4th Cir. 1968), the Court of Appeals for the Fourth Circuit held that "there are items in the report of which the defendant is rightfully entitled to be advised" (p. 933). Thus, that court recognizes that under certain circumstances a disclosure must be made so as to satisfy due process guarantees, a constitutional safeguard which the Court of Appeals for the Second Circuit effectively undercuts by relegating it to the discretion of the trial judge.

(2) This Court should settle the question of whether a petitioner, whose term of sentence and eligibility for parole are governed by a secretive pre-sentence report which contains erroneous and prejudicial charges

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* It is inconceivable that a search lasting in excess of one hour could be justified by a need of personal protection and to prevent the destruction of evidence. The length of the search itself rejects its propriety under the *Chimel* principles.

against him, is to be afforded constitutional protection by requiring the trial judge to make partial disclosure of the contents of such report, at least to the extent of any charges of conviction or commission of crime.

In the instant case the petitioner has not seen or been advised of any of the contents of the pre-sentence report. It is apparent, however, that the report contains information extremely prejudicial to the petitioner, and probably includes an accusation by the United States Attorney's office that the petitioner had committed an identical crime after indictment and prior to trial, a charge which is not true.*

Any defendant who is branded by such a charge, without his knowledge of the charge and without an opportunity to refute it, sustains immediate irreparable prejudice at sentencing and, in addition, receives virtually a conclusive bar to parole despite the standards for release as set forth in Title 18, section 4203 of the United States Code. In fact, in the instant case, the Department of Justice has stated that this petitioner has a "very slender" case for parole despite his excellent record since sentencing.

The pre-sentence report should not enjoy any sanctity of secrecy when its effect is to condemn a defendant with erroneous information, not only affecting the length of his sentence but also his eligibility for parole.

This Court has held that the pronouncement of sentence on information extensively and materially false, where a defendant is not afforded an opportunity to

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* Although the court below ordered at oral argument the pre-sentence report to be transmitted to it, it chose not to discuss the nature of its contents, which would have been of assistance in outlining the constitutional problems presented.

correct or controvert the erroneous basis of punishment, renders the proceedings lacking in due process. *Townsend* v. *Burke,* 334 U.S. 736 (1948). Cf. also *Kent* v. *United States,* 383 U.S. 541 (1966). However, a due process guarantee against a sentence predicated on misinformation will be rendered meaningless unless the petitioner has some way of determining that the sentencing judge was misadvised.* The guarantee will be viable only if criminal charges and accusations made against the petitioner under Star Chamber conditions in a pre-sentence report are, as a matter of minimum due process, required to be disclosed by the trial judge to the petitioner and his counsel before sentencing. This the trial judge failed to do in the instant case.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

May 20, 1970

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* Concurring opinion of Judge Winter in *Baker* v. *United States, supra,* 388 F.2d at 935, n. 1.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 469, 470—September Term, 1969

(Argued January 15, 1970 Decided April 20, 1970)

Docket Nos. 32258, 34193

UNITED STATES OF AMERICA, *Appellee,*

v.

THOMAS KEE MING HSU, *Defendant-Appellant.*

Before:

MEDINA, WATERMAN and SMITH, *Circuit Judges.*

Appeals from a judgment and an order of the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

Thomas Kee Ming Hsu appeals from a judgment of conviction entered upon the verdict of a jury on eleven counts of an indictment charging violations of 18 U.S.C. Sections 1343 and 2314 and from an order denying his motion under Fed. R. Crim. P. 35 to reduce or suspend his sentence. Affirmed.

PETER L. TRUEBNER, Assistant U. S. Attorney, New York, N. Y. (James D. Zirin, Assistant U. S. Attorney, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for appellee.*

HERBERT L. AWE, Washington, D. C., *for defendant-appellant.*

MEDINA, *Circuit Judge:*

We have before us here two appeals by the defendant, Thomas Kee Ming Hsu. The first appeal is from his conviction on eleven counts of a twelve-count indictment charging him with wire fraud, causing the interstate travel of a victim in execution of a fraudulent scheme, and causing the interstate transportation of money taken by fraud, in violation of 18 U.S.C. Sections 1343 and 2314. This appeal raises no question of the sufficiency of the evidence to support the charges but principally attacks what is said to be an unlawful search and seizure, in violation of his Fourth Amendment rights, at the time of his arrest by F.B.I. Agents at his apartment in Riverdale, New York at 5 p.m. on November 22, 1965 in execution of a bench warrant issued earlier that afternoon. There was no search warrant. Hsu also claims that the use of certain evidence obtained in this search violated his privilege against self-incrimination under the Fifth Amendment. The second appeal is from an order denying Hsu's motion under Fed. R. Crim. P. 35 to suspend or reduce his sentence of eight years' imprisonment imposed by Judge McGohey after a lengthy trial.

The fraudulent scheme executed by Hsu was so bizarre and improbable that until after one has scrutinized the abundance of evidence of Hsu's ingenious methods of operation the whole thing seems incredible. And yet, over a period of four years, he managed to extract from his victims no less a sum than $170,000. How did he accomplish this feat?

Hsu sized up his victims with deliberation and let the impression of his extremely persuasive personality sink in long before he approached the subject of money. His apparatus alone were impressive: a large Cadillac automobile with diplomatic license plates and a police siren, a loaded revolver in a shoulder holster which he made no effort to conceal, and photographs of him with Generalis-

simo Chiang Kai-shek, the President of the Republic of China, apparently reviewing troops. He represented to his victims that he had been a general in the Nationalist Chinese Army, a bodyguard of Generalissimo Chiang Kai-shek, and that he was on intimate terms with the Generalissimo and with Madame Chiang, his wife. He also claimed to be a member of the diplomatic staff of the Republic of China and a man of extraordinary accomplishments in assisting the United States Government, which had awarded him the Congressional Medal of Honor.

At the appropriate time, and in a burst of confidence, he would disclose the supposed fact that Generalissimo Chiang Kai-shek was really a prisoner of his own people in Taiwan and that the struggle for power involved his son and perhaps even Madame Chiang. Therefore, some years before, the story went, Chiang Kai-shek had entrusted Hsu with negotiable American securities and jewels, the value of which was variously represented to be worth from between one hundred million dollars to almost one billion dollars, and all of this fortune was in a safe-deposit box in Taiwan to which only Hsu had access. Hsu purportedly had been deputized by Chiang Kai-shek to get this huge fortune to the United States and hold it for safekeeping until the Generalissimo arrived. In the meantime, Hsu was given full power to use as much of the fund as he needed to compensate those who gave much-needed assistance to accomplish the mission. Needless to say, the entire story was a hoax.

The sums obtained from the victims varied substantially in amount, and so did Hsu's stories about his financial requirements. Many of his needs, as he described them, had to do with trips to the Orient, the bribery of Chinese officials, and so on.

We think this is a sufficient background for understanding what occurred in Hsu's apartment on November 22, 1965.

At the entrance door to the apartment, F.B.I. Agent Edgar N. Best immediately put Hsu under arrest and gave him the full *Miranda* warnings. In his testimony at the pretrial suppression hearing before Judge Sugarman, Agent Best testified that his first concern was to locate any weapons, especially the loaded revolver which Hsu had shown to the various victims. So Agent Best asked Hsu where he kept his pistol, and Hsu replied, "I'll show you." They then walked down a corridor or hallway a distance of some 30 feet and turned to a cupboard. As Hsu was reaching into the cupboard, Agent Best put his arm in first and brought out a shoulder holster containing a loaded .38 caliber revolver. There was a bedroom about four or five feet from the cupboard, and by the time Agent Best took into his possession the loaded revolver Hsu had backed into the doorway of this room, which, as Agent Best discovered by asking him, turned out to be Hsu's bedroom and office. As Agent Best proceeded to unload the weapon, he and Hsu found themselves in the bedroom. This room contained a desk on the surface of which numerous papers were lying, all of which Hsu said belonged to him, also a bureau and a number of flight bags. As Agent Best looked down at the top of the desk, he immediately observed what appeared to be a black .25 caliber automatic. This turned out to be "one of those lighter type things" and not a real pistol, but it might have been seized by Hsu and used to hold the agents at bay and give him a chance to escape. No other weapons were found on Hsu's person.

Agent Best, aided by Agent Hansen, then proceeded to search the contents of the bedroom, taking about an hour and fifteen minutes to do so. Thus they found and seized another shoulder holster and a hip holster, neither of which contained any weapon, several phony photographs of Hsu and Generalissimo Chiang Kai-shek, a pistol permit, Hsu's United States passport, a brown envelope marked "Max," which concerned Max Ruderian, one of the victims, and several wire communications, telegrams, and receipts, all clearly related to the crimes charged in the indictment.

During this search, Hsu was permitted to and did speak with his lawyer over the telephone.

There was no general ransacking or rummaging about in the apartment as a whole although Agent Best took a quick look around to see if a fugitive from justice, who appeared in one of the miscellaneous photographs that were found, might possibly be in the apartment.

I.

We find no infringement of Hsu's constitutional rights under the Fourth, Fifth, or Sixth Amendments. Hsu's admissions on the occasion of the search were made voluntarily; he appeared quite willing to cooperate with the agents after he had been advised that he could remain silent, that whatever he said could be used in court against him, that he had the right to have a lawyer present or, if he could not afford a lawyer one would be provided without expense to him. Furthermore, when Hsu indicated he wanted to call his lawyer, he did so without any hindrance by the Agents.

Thrown in for good measure is a claim that the arrest was only a pretext to justify the search. This more or less common assertion in this type of case is made up out of whole cloth. There is not a scintilla of proof in the record to sustain this charge. The bench warrant was issued between 2 and 3 p.m. on November 22, 1965, and the arrest was made at Hsu's apartment in Riverdale at 5 p.m. There was no delay, and Agent Best testified that he thought the most likely place to find Hsu was at his home.

Moreover, as the search and seizure occurred in 1965, *Chimel* v. *California*, 395 U.S. 752 (1969) does not apply. See *United States* v. *Bennett*, 415 F.2d 1113 (2d Cir. 1969); see also *United States ex rel. Angelet* v. *Fay*, 333 F.2d 12 (2d Cir. 1964), *aff'd*, 381 U.S. 654 (1965). Even if *Chimel* were applicable, we think the search was proper because it covered "the area from within which he [Hsu] might have obtained either a weapon or something that could have been

used as evidence against him." 395 U.S. at 768. Although the arrest was at the entrance door to the apartment, it would be unreasonable to restrict the search to the area immediately adjacent to the entrance door in view of the fact that the request for Hsu's weapon led to the cupboard and to the combined bedroom and office, where the lighter that resembled an automatic pistol was lying on the desk. In any event, it is clear that the search was well within the scope of the rulings in *Harris* v. *United States,* 331 U.S. 145 (1947) and *United States* v. *Rabinowitz,* 339 U.S. 56 (1950). Cf. *United States* v. *Sparano,* Slip Op. 1771, 1773-75 (2d Cir. March 3, 1970). By no stretch of the imagination can it be considered a general exploratory search of the kind condemned in *Von Cleef* v. *New Jersey,* 395 U.S. 814 (1969); *United States* v. *Lefkowitz,* 285 U.S. 452 (1932); and *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931).

Having concluded that the search was incidental to a lawful arrest both under *Chimel* and prior law, the next question we must consider is whether the items taken in the course of the search were properly seized. The photographs, the gun, the holsters, and the telegrams were integral parts of Hsu's scheme to persuade his victims that he was an intimate of Generalissimo Chiang Kai-shek. See, e.g., *Harris* v. *United States, supra,* at 153-54; *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). The other items seized, especially the passport and the papers relating to Max Ruderian were evidence of the crime. See *Warden* v. *Hayden,* 387 U.S. 294 (1967). Although the seizure occurred before *Warden* v. *Hayden* was decided, and at a time during which "mere evidence" seized in a search conducted pursuant to a lawful arrest was not admissible, see *United States* v. *Lefkowitz,* 285 U.S. 452, 465-66 (1932), the trial occurred after the decision in *Hayden;* and the evidence seized was therefore admissible. See *United States* v. *Wild,* Slip Op. 247, 253 (2d Cir. Sept. 11, 1969); *United States* v. *Bennett,* 409 F.2d 888, 896-97 (2d Cir.),

cert. denied, sub nom. *Haywood* v. *United States,* 396 U.S. 852, *rehearing denied,* 396 U.S. 949 (1969).

Hsu also asserts that the use of the photographs violated his Fifth Amendment privilege against self-incrimination because they were subjected to expert analysis which indicated that they had been doctored, and testimony to that effect was introduced over objection at the trial. Hsu attempts to support this contention by classifying the photographs as "private papers" which he was compelled to surrender to the F.B.I. Agents.

We reject this bootstrapping argument. By convenient use of lables Hsu has endeavored to impart the sanctity of "private papers" to photographs which were nothing more than instrumentalities of his crime. As seizure was proper, the testimony was admissible and did not infringe Hsu's privilege against self-incrimination. See *United States* v. *Bennett, supra,* at 895-96. We see no analytical difference between the testimony given in this case and that given as the result of analyzing handwriting exemplars or specimens of blood taken from a defendant. See *Gilbert* v. *California,* 388 U.S. 263, 266-67 (1967); *Schmerber* v. *California,* 384 U.S. 757 (1966).

II.

Hsu also asks us to vacate his sentence and order a remand because at the time of his sentencing he was denied access to the pre-sentencing report prepared by the Probation Office for the use of the District Judge. A timely motion under Fed. R. Crim. P. 35 was made to reduce or suspend the sentence, and the motion was denied.

At the time of sentencing, on March 5, 1968, the following colloquy occurred between Hsu's lawyer and Judge McGohey:

> Mr. Goldberg: * * *
>
> He has no previous record. Now, the probation report, I am sure, should attest to the fact that this de-

fendant has been of great service to a number of law enforcement agencies of the United States Government. I have been in touch with Agent Feldman, Agent Best—

The Court: I wouldn't press that first one.

Mr. Goldberg: I trust that the matters dealing with the defendant have been set forth in the probation report.

The Court: I wouldn't press that first reference if I were you.

Mr. Goldberg: Your Honor, I know—

The Court: Or any of the others, for that matter.

Although Hsu previously was enlarged on $10,000 bail, Judge McGohey ordered him remanded after a further colloquy during which the prosecutor stated that Hsu "told at least two persons that he intends not to go to jail."

The motion to reduce or suspend Hsu's sentence, made on December 11, 1968, pursuant to Fed. R. Crim. P. 35, was based on Hsu's alleged assistance to various Government agents as an informer. The motion requested a hearing *in camera* to determine the degree of assistance Hsu provided. The motion was denied summarily by Judge McGohey, who stated:

> He [Hsu] urges as a basis for relief, alleged assistance to government agents in various pending cases. It is not necessary to decide the value, if any, of his efforts because, in any event, the court is persuaded that the original sentence should not be modified or suspended.

We find no error in Judge McGohey's refusal to permit Hsu or his lawyer to examine the pre-sentence report. This Court and others have held that to permit or to refuse such

examination lies within the discretion of the trial judge.[1] We find no abuse of discretion here.

Judge McGohey had ample opportunity to observe Hsu as he testified at considerable length during the trial. The proof of his various expedients to deceive his victims and of his threats of dire consequences should these victims disclose what they knew to law-enforcement officers after the scheme fell of its own weight was abundant and convincing. It is a fair inference that Judge McGohey thought Hsu was an unprincipled scoundrel who well deserved the sentence imposed upon him, regardless of any assistance he may or may not have rendered to the Government as an informer. The cases upon which Hsu relies, i.e., *Townsend* v. *Burke*, 334 U.S. 736 (1948) and *Baker* v. *United States*, 388 F.2d 931 (4th Cir. 1968), are clearly distinguishable.

The judgment and order are affirmed.

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[1] See Fed. R. Crim. P. 32(c)(2); *United States* v. *Crutcher*, 405 F.2d 239, 245 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *United States* v. *Fischer*, 381 F.2d 509, 511-13 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968); *United States* v. *Trigg*, 392 F.2d 860, 864 (7th Cir.), *cert. denied*, 391 U.S. 961 (1968); *Thompson* v. *United States*, 381 F.2d 664, 666-67 (10th Cir. 1967); *Roeth* v. *United States*, 380 F.2d 755, 757 (5th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968); *Bannister* v. *United States*, 379 F.2d 750, 754 (5th Cir. 1967), *cert. denied*, 390 U.S. 927 (1968); *United States* v. *Weiner*, 376 F.2d 42 (3d Cir. 1967); 8A J. Moore, Federal Practice ¶32.03[4] (2d ed. 1969). Cf. *United States* v. *Holder*, 412 F.2d 212, 215 (2d Cir. 1969).

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1594

THOMAS KEE MING HSU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on eleven counts charging him with fraud, causing the interstate travel of a victim in execution of a fraudulent scheme, and causing the interstate transportation of fraudulently obtained money, in violation of 18 U.S.C. 1343 and 2314. He was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. 1a-9a).

Petitioner contends that a search of his apartment in 1965, incident to his arrest there and pursuant to a bench warrant, violated the pinciples of *Chimel* v. *California*, 395 U.S. 752, and that the trial judge erred in refusing to reveal the contents of a pre-sentence report. In urging that the petition for a writ of certiorari should be denied, we rely upon the opinion of the court below. As the opinion points out, the search was not unreasonable under *Chimel*, even assuming that decision to have retroactive application. There is, therefore, no occasion to delay disposition of this petition pending decision next Term in the two cases now before this Court which raise the issue of retroactivity of *Chimel*.[1]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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[1] *Williams* v. *United States*, certiorari granted, 397 U.S. 986; *Elkanich* v. *United States*, certiorari granted, 396 U.S. 1057.

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